IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
December 12, 2007 Session

CLARK E. FRIERSON v. ROBERT C. JOHNSON

Appeal from the Chancery Court for Bedford County
No. 24,759 J.B. Cox, Chancellor

No. M2006-02598-COA-R3-CV - Filed February 28, 2008

The trial court entered a default judgment in favor of the plaintiff and dismissed the defendant's countercomplaint pursuant to Tenn. R. Civ. P. 37.02 based upon the defendant's failure to respond to the court's orders regarding discovery responses. The defendant claims that his failure to provide the discovery responses and to appear at several hearings resulted from his mistaken belief that an attorney was handling the matter for him. The trial court denied the defendant's Rule 60 motion. Because the defendant did not receive proper notice of the hearing on the plaintiff's motion for default, we have determined that the trial court erred in denying the defendant's Rule 60 motion.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed and Remanded

ANDY D. BENNETT, J., delivered the opinion of the court, in which ALAN E. HIGHERS, P.J., W.S., and JON KERRY BLACKWOOD, SP.J., joined.

Ralph McBride, Jr., Shelbyville, Tennessee, for the appellant, Robert C. Johnson.

Mary C. White, Shelbyville, Tennessee, for the appellee, Clark E. Frierson.

OPINION

Clark Frierson filed this lawsuit in June 2003 against Robert Johnson alleging that Mr. Johnson breached an oral agreement concerning the construction of a spec house on property owned by Mr. Johnson. Mr. Frierson alleged that he completed construction on the home in March 2001, but Mr. Johnson had refused to pay him for his labor in accordance with their contract. Mr. Johnson filed an answer and countercomplaint. The case was originally set for trial in December 2004, but Mr. Johnson's attorney died shortly before the trial date and the case was continued.

Mr. Frierson served his first requests for interrogatories and for production of documents upon Mr. Johnson on September 23, 2005. On November 21, 2005, the trial court entered an order requiring that "any delinquent Answers to Interrogatories and Request for Production from either party must be filed within thirty (30) days from this hearing and any and all other discovery

responses subsequently filed, will be due within the statutory time frame of thirty (30) days thereafter." On February 17, 2006, Mr. Frierson filed a motion to compel discovery regarding his first set of interrogatories and request for production of documents; he also served a second request for production of documents on Mr. Johnson. On March 10, 2006, the court entered an order finding that "Defendant [Mr. Johnson] produced some documentation but failed to Answer the Interrogatories as required by law and failed to produce all documents requested." Mr. Johnson did not appear at the hearing, and the court granted Mr. Frierson's motion to compel. The court ordered that Mr. Johnson "be required to submit all discovery responses to counsel for Plaintiff by the 21st day of March, 2006" and awarded Mr. Frierson his attorney fees for the motion to compel.

On April 27, 2006, Mr. Frierson filed a motion for default judgment pursuant to Tenn. R. Civ. P. 37 asserting that Mr. Johnson had "completely failed or refused to provide his Answers to the Interrogatories or to supply the Requests for Documents" in violation of the court's orders. The certificate of service on Mr. Frierson's motion for default judgment stated that the motion had been served on Mr. Johnson by placing a copy of the motion in the mail on April 26, 2006. In accordance with the notice included in the motion for default judgment, a hearing on the motion was held on May 5, 2006. Mr. Johnson did not attend the hearing. In an order entered on July 7, 2006, the court made a number of findings, including the following:

> That, Defendant's [Mr. Johnson's] behavior throughout the course of this matter is indicative of an intent to defraud Petitioner [Mr. Frierson] of the terms of their agreement or to pay Petitioner for his labor on the said property. That, Defendant's total lack of respect and disregard for the Orders of this Court in addition to the fact that Defendant had sold the property *prior to* the filing of Petitioner's initial complaint on May 23, 2003 (see Exhibit A) is evidence that Defendant had no intention to honor any agreement for payment for Petitioner's labor on this property.

Pursuant to Tenn. R. Civ. P. 37.02, the court ordered default judgment for Mr. Frierson in the amount of $38,500 for his labor in the construction of the house. The court further ordered that the facts in Mr. Frierson's complaint "are taken as established herein and pursuant to Tenn. R. Civ. Proc., Rule 37.02 (B), Defendant is hereby prohibited from further introducing designated matters or defenses into evidence." Mr. Frierson's countercomplaint was stricken pursuant to Tenn. R. Civ. P. 37.02.

Mr. Johnson filed a motion to set aside the order of default judgment on August 8, 2006, alleging that he had been unable to retain an attorney but desired to be represented. Mr. Johnson's motion was heard on August 18, 2006. According to the statement of the evidence submitted on appeal, attorney Steve Bowden appeared at the hearing and advised the court that "he had discussed the case with the Defendant [Mr. Johnson]" and that "he did not represent Defendant but that he had told the Defendant he would try to assist him if there was any chance the matter could be settled." The statement of the evidence goes on:

> Chancellor Cox addressed Defendant [Mr. Johnson] and asked him if Mr. Bowden was his attorney or if had [sic] he thought that Mr. Bowden was his attorney in this case.

> Defendant told the Chancellor, "No, Mr. Bowden is not my attorney. I know that Mr. Bowden is a very busy man." Defendant also stated that he had another attorney. The Chancellor asked him who his attorney was and Defendant responded that he had spoken to Ralph McBride.

At that point, Mr. Bowden was excused by the court. Mr. Frierson's attorney asked the court's permission to talk with Mr. McBride, who was in the courthouse at the time, and returned to inform the court that Mr. McBride had spoken with Mr. Johnson but had not been retained by him. Mr. Johnson then left the courtroom and returned with Mr. McBride, who told the court that Mr. Johnson had retained him. The court treated Mr. Johnson's motion to set aside as a motion under Tenn. R. Civ. P. 59 and dismissed it as not timely filed.

Mr. Johnson, now represented by attorney McBride, filed a motion on October 20, 2006, asserting that he was entitled to relief pursuant to Tenn. R. Civ. P. 60.02. In support of this motion, Mr. Johnson submitted a lengthy affidavit concerning his actions during the course of the lawsuit. Mr. Johnson stated that, after the death of his original attorney, he had attempted to represent himself and had taken relevant documentation to Mr. Frierson's attorney. A meeting scheduled with Mr. Frierson's attorney "in early 2006" was cancelled by the attorney. The affidavit then states:

> 5. After the meeting [with Mr. Frierson's attorney] was canceled, I met with Steve Bowden [an attorney] to see if he could represent me. Mr. Bowden was at that time representing the estate of my grandmother, Sarah Hamner. Mr. Bowden told me that he would look at the case and that if he could settle it without going to court there would be no charge. He told me that he would not be able to try the case because he lacked the time to do so.
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> 6. After I met with Mr. Bowden, I received a Motion to Compel Discovery which was set for March 3, 2006. I called Mr. Bowden's office and spoke with his secretary, Lisa Blackwell. I asked if Mr. Bowden had received the Motion to Compel Discovery. She said that he had not received it. Shortly thereafter, I delivered the Motion to his office.
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> 7. Later, I called Mr. Bowden's office and asked if I should be in court on March 3, 2006. His secretary told me that I did not need to be in court because Mr. Bowden was handling the case and he was in contact with Mary White [Mr. Frierson's attorney].
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> 8. I gave Mr. Bowden my entire file concerning this case. I did not leave the file with him at the initial meeting, but I gave my file to him at a later date.
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> 9. During the period of time prior to the Default Judgment, I had numerous conversations with Mr. Bowden's secretary about this case and two conversations with Mr. Bowden. I called his office on numerous occasions during this period of time to deal with matters concerning my grandmother's estate. When I contacted his office about my grandmother's estate, I would often discuss this case. They told me

that they were in contact with Mary White, that I should not worry about the case, and that they were taking care of it. I asked Mr. Bowden if he needed any money. He said he did not if he was able to settle the case out of court. When I received anything in the mail from Mary White's office, I took it to Mr. Bowden's office.

10. After I received the Default Judgment in the mail, I took it to Mr. Bowden's office and asked what it meant. Mr. Bowden['s] secretary said she did not know what it meant. She said that she had talked to Mary White's secretary that morning and that she would look into it. I also talked to Steve Bowden. I was very upset. He told me not to worry about it. Later, I spoke with Mr. Bowden's secretary by telephone. She told me that Mary White was in the hospital when the Default Judgment was taken and that one of her aides inadvertently obtained the Default Judgment. Mr. Bowden's secretary assured me that Mary White would not go forward with enforcing the Default Judgment.

11. A few days after this telephone conversation, I received a letter from Mr. Bowden requesting a $2,500 retainer. [A copy of the letter was attached]. After I received this letter, I called Mr. Bowden's office either the same day I received the letter or the next day. I could not get an answer. My brother then drove to Mr. Bowden's office and talked to his secretary. Mr. Bowden's secretary then called and said that Mr. Bowden would represent me if I paid a retainer in the amount of $2,500. I said it would take about 10 days to get that much money. She said she would have to talk to Mr. Bowden, who was in court and would be back in the office at about one o'clock. When Mr. Bowden's secretary did not call back, I called again either the same day or the next day. Mr. Bowden's secretary then told me that Mr. Bowden could not represent me, and that he would send me some paperwork to file with the court. Mr. Bowden's secretary said she would mail it the next day.

12. A letter from Mr. Bowden was delivered to my home late in the afternoon on Friday, August 4, 2006. [Copies of the letter and envelope were attached]. The envelope contained the letter, a Motion to Set Aside Default Judgment, and most of my file on this case. I was not at home when the envelope was delivered because I had left town in the course of my employment as a truck driver.

13. On Monday, August 7, 2006, I called Mr. Bowden's secretary and asked what I should do about the Motion to Set Aside Default Judgment. She said to file it immediately. I was unable to file the Motion on Monday because of my work. I filed it on Tuesday, August 8, 2006.

On October 24, 2006, following the filing of his Rule 60.02 motion, Mr. Johnson filed answers to Mr. Frierson's interrogatories and requests for production of documents.

After a hearing, the court denied Mr. Johnson's Rule 60 motion. The court's findings included the following:

b. This Court finds that the only potential ground for the Rule 60 Motion is excusable neglect. The responsibility of the case is the Defendant's [Mr. Johnson's]. If Defendant relied on legal advice, and if advice resulted in the default judgment, there is a cause of action against Mr. Bowden. Defendant is responsible because he did not pay attention to the lawsuit, and he did not insist on whether his attorney was in or out.

c. Defendant knew that Mr. Bowden was not going to represent him if the case was contested and was put on notice of the same. Defendant did not appear at hearings even though he was apprised of them. Defendant knew, or should have known, of his deadlines and Mr. Bowden's poor conduct and lack of attention to this matter.

The court cited *State ex rel. Jones v. Looper*, 86 S.W.3d 189 (Tenn. Ct. App. 2000), in support of its finding that there was no excusable neglect entitling Mr. Johnson to relief from the judgment against him.

On appeal, Mr. Johnson argues that the trial court erred in denying his Rule 60 motion to set aside the default judgment. Mr. Frierson argues that the trial court properly denied the motion to set aside the default judgment; he further asserts that the trial court erred in failing to find that the denial of the motion to set aside was also proper due to the clear record of delay or contumacious behavior by Mr. Johnson.

ANALYSIS

The appropriate standard of review with respect to a trial court's decision to grant or deny a motion to set aside a default judgement is the abuse of discretion standard. *Henry v. Goins*, 104 S.W.3d 475, 479 (Tenn. 2003). Under this standard, we do not substitute our judgment for that of the trial court. *Id.* at 479. We will find an abuse of discretion only where the trial court "applie[d] an incorrect legal standard or reache[d] a decision which is against logic or reasoning and which causes an injustice to the complaining party. *Doe 1 ex rel. Doe 1 v. Roman Catholic Diocese of Nashville*, 154 S.W.3d 22, 42 (Tenn. 2005).

Tenn. R. Civ. P. 55.02 provides that, "[f]or good cause shown the court may set aside a judgment by default in accordance with Rule 60.02." Tenn. R. Civ. P. 60.02 provides, in pertinent part, that a court may relieve a party from a final judgment for certain reasons, including "mistake, inadvertence, surprise or excusable neglect." The Tennessee Supreme Court has stated that, "[c]ourts construe requests for relief pursuant to Rule 60.02 much more liberally in cases involving default judgments than in cases following a trial on the merits. *Goins*, 104 S.W.3d at 481. In determining whether a default judgment should be vacated under Rule 60.02, courts consider three factors: (1) whether the default was willful; (2) whether the defendant has a meritorious defense; and (3) whether the granting of relief would result in prejudice to the nondefaulting party. *Id.* at 481; *Tennessee Dep't of Human Servs. v. Barbee*, 689 S.W.2d 863, 866 (Tenn. 1985).

Under Tenn. R. Civ. P. 55.01, "[a]ll parties against whom a default judgment is sought shall be served with a written notice of the application for judgment at least five days before the hearing on the application, regardless of whether the party has made an appearance in the action." Pursuant to Tenn. R. Civ. P. 6.05, an extra three days is required if service by mail is used; and, pursuant to Tenn. R. Civ. P. 6.01, weekends and holidays are excluded in computing time periods shorter than 11 days. Tenn. R. Civ. P. 55.01 (2000 advisory committee cmt). In the present case, the certificate of service on Mr. Frierson's motion for default judgment states that the motion was mailed on April 26, 2006; the hearing was held on May 5, 2006. While not denying that he received notice of the motion for default judgment and of the hearing, Mr. Johnson asserts that the notice of hearing was inadequate under Tenn. R. Civ. P. 55.01. We agree. April 26, 2006 fell on a Wednesday. Excluding weekends and adding three days for service by mail, we calculate that the earliest the hearing could properly have been held was Monday, May 8, 2006. We must conclude, therefore, that Mr. Johnson did not receive proper notice of the hearing under Rule 55.01.[1]

What then results from insufficient notice of the hearing? In *Decker v. Nance*, E2005-2248-COA-R3-CV, 2006 WL 1132048 (Tenn. Ct. App. Apr. 6, 2006), the court addressed facts very similar to those in the present case. The motion for default in *Decker*, a paternity case, was served by mail on January 22, 2003, and the hearing was held on January 28, 2003. *Id.* at *3. As in the instant case, the defendant in *Decker* did not deny that he received the motion and hearing notices in the mail. *Id.* at *1. Under the notice provisions of Tenn. R. Civ. P. 55.01, the court concluded that the earliest date the motion could properly have been heard was February 3, 2004. The court cited the principle that "[t]he showing of a meritorious defense is not required 'where the default judgment was procured in violation of the Rules of Civil Procedure.'" *Id.* at *3 (quoting *Churney v. Churney*, 1993 WL 273891 (Tenn. Ct. App. July 22, 1993)). The court in *Decker* therefore concluded that "the trial court abused its discretion in not setting aside the default judgment in this matter, as [the defendant] was not afforded five days' notice of the hearing on the motion for default judgment as required by Tenn. R. Civ. P. 55.01." *Id.* at *4.

Mr. Frierson cites the case of *Estate of Vanleer v. Harakas*, No. M2001-00687-COA-R3-CV, 2002 WL 32332191 (Tenn. Ct. App. Dec. 5, 2002), in support of his assertion that Mr. Johnson waived the issue of insufficient notice by failing to address it in his Rule 60 motion. We find no support for this proposition in the *Vanleer* case. In *Vanleer*, the trial court granted the plaintiff's motion for default judgment at a hearing not attended by the defendants, who later asserted that they had not received notice of the motion. *Id.* at *2. In support of motions to set aside the default judgment, the defendants also argued that the hearing on the motion for default judgment was held prior to the expiration of the 33-day notice required by Tenn. R. Civ. P. 55.01 at that time. *Id.* In denying the defendants' second set of motions to set aside the default judgment, the trial court

[1] A related issue not raised by the parties is whether the notice provisions of Tenn. R. Civ. P. 55.01 regarding default judgments apply to a default judgment issued pursuant to Tenn. R. Civ. P. 37.02 as a discovery sanction. We have concluded that they do. By their terms, the notice requirements of Tenn. R. Civ. P. 55.01 are applicable to "[a]ll parties against whom a default judgment is sought." In *Burnette v. Sundeen*, 152 S.W.3d 1, 4-5 (Tenn. Ct. App. 2004), the court applied the requirements of Rule 55.01 to a default judgment obtained as a discovery sanction. *Cf. Orten v. Orten*, 185 S.W.3d 825, 830 n.3 (Tenn. Ct. App. 2006) (addressing the authority for entry of a default judgment, not the notice issue).

pointed out that the premature nature of the hearing had not been raised in the defendants' initial motion to set aside and the argument was therefore waived. *Id.* at *3. This reasoning was not, however, adopted by the court on appeal. Rather, the appellate court concluded that, if the defendants did not receive actual notice of the motion for default judgment and the hearing, they would demonstrate excusable neglect. *Id.* at *7. The court expressly declined to address the issue of the prematurity of the hearing since the defendants were claiming lack of actual notice. *Id.* at *7, n.9.

The *Vanleer* decision includes a helpful discussion of the distinction between cases holding that "a default judgment entered without proof of proper notice is void" and other cases stating that "failure of notice is justification for excusable neglect, implying that the default judgment is merely voidable, not void." *Id.* at *6, n.7. The court gave the following analysis:

> We think the distinction may lie in the proof of service presented to the trial court when default judgment is requested. Where, as in this case, the default judgment was granted on the basis of counsel's certificate of service, which constitutes proof of service, the judgment was validly entered at the time, and the question is whether it should have been set aside based upon equitable principles. Thus, the judgment was not void. The question of whether a default judgment entered without notice or compliance with other procedural requirements is primarily relevant herein to the question of whether, to obtain relief from judgment, the defendant is required to demonstrate a meritorious defense. Generally, a party seeking to set aside a default judgment must show that he or she has a meritorious defense to the suit, but that requirement does not apply where the default judgment is void.

Id. at *6, n.7. This reasoning is consistent with *Decker* and another post-*Vanleer* case, *Reynolds v. Battles*, 108 S.W.3d 249, 251 (Tenn. Ct. App. 2003). In *Reynolds*, notices concerning the motion for default judgment and the hearing on the motion were sent to the wrong street address (408 Magnolia Street instead of 508 Magnolia Street) and the defendants denied receiving them. *Id.* at 252. The court concluded that "sufficient doubt exists to justify setting the default judgment aside." *Id.* Because of the improper notice, which was apparent on the certificates of service, the court determined that the defendants' failure to assert a meritorious defense was not fatal to their motion to set aside the default judgment. *Id.* at 253.

Applying the *Vanleer* reasoning to the present case, we reach the conclusion that the default judgment should be considered void, not voidable, since it was issued with insufficient notice of the hearing that was evident from the certificate of service, as in *Decker*. Nothing in this decision should be construed to condone Mr. Johnson's lack of diligence in responding to the trial court's orders or in clarifying his relationship with Mr. Bowden. Because of the facially insufficient notice, however, we need not address the issue of excusable neglect under Rule 60.02.

We conclude that the trial court abused its discretion in failing to grant Mr. Johnson's motion for Rule 60 relief due to the premature hearing in violation of the procedural requirements of Tenn. R. Civ. P. 55.01. We, therefore, reverse the decision of the trial court and remand for further proceedings.

Costs of appeal are assessed against the appellee, for which execution may issue if necessary.

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ANDY D. BENNETT, JUDGE